United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

ORIGINAL

76-1592

B P/S

United States Court of Appeals For the Second Circuit

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

-against-

HARRY HOFFER,
Defendant-Appellant.

On Appeal From The Denial
Of A Motion For A New Trial
By The United States District Court
For The Southern District Of New York

BRIEF FOR APPELLANT
HARRY HOFFER

RALPH S. NADEN
Attorney for Appellant
253 Broadway, Rm. 850
New York, N.Y. 10007
(212) 964-1998

Dick Bailey Printers, 290 Richmond Ave., Staten Island, N.Y. 10302
Tel.: (212) 447-5358

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Ralph S. Naden
ATTORNEY AT LAW

253 BROADWAY
NEW YORK, N. Y. 10007
TEL. (212) 964-1998

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January 25, 1976

United States Court of Appeals
for the Second Circuit
United States Courthouse
Foley Square
New York, N.Y. 10007
Attention: Ms. Sophie Korecki

Re: U.S.A. -v- Harry Hoffer
Docket No. 76-1592

Gentlemen:

Please note two errors in the appellant's Brief submitted in the above-captioned action:

1. Pages 11 and 12 of the Brief are in reverse order;

2. Page 29 notes that the original trial was a "ten-day" trial; the correct length of the trial was five days.

Thank you for your attention.

Very truly yours,

Ralph S. Naden

RSN: fg

cc.: W. Cullen MacDonald, Esq.
Assistant United States Attorney

Rec'd 1-26-77 mb

TABLE OF CASES

OTHER AUTHORITIES

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

* *

UNITED STATES OF AMERICA,

Plaintiff-Appellee

-against-

HARRY HOFFER,

Defendant-Appellant.

Docket No. 76-1592

* *

QUESTIONS PRESENTED

STATEMENT PURSUANT TO RULE 28 (A) (3):

PRELIMINARY STATEMENT

Appellant Harry Hoffer appeals from the denial of his motion for new trial pursuant to Rule 33, Federal Rules of Criminal Procedure, by the Honorable Milton Pollack, United States District Judge, Southern District of New York, who had presided at the appellant's jury trial in June, 1973. The motion was made upon newly discovered evidence and in the interest of justice, and had two independent bases. The first basis was that documentary proof had come to light since the trial indicating that the most damaging trial testimony against Hoffer - that he controlled, broke, and tock hundreds of thousands of dollars from bank time deposit accounts located in the First National City Bank of Nassau, Bahamas - was false and inaccurate; the second involved evidence that Hoffer's trial attorney, James M. LaRossa, Esq., labored under a conflict of interest, as stated

in sworn affidavits by two of Hoffer's co-defendants.[1]

STATEMENT OF FACTS

A. The Trial Evidence

The appellant had been indicted with three other defendants in December, 1972, for the crimes of mail and wire fraud and related offenses (See Judgment and Conviction Order, Appendix 14) connected with the sale of land at ten times its actual value to Maria Trujillo Dominguez, the daughter of the late Dominican dictator. At the time of the alleged crime in 1967, Hoffer was employed as an attorney by co-defendant Alfred Hemlock, of whom Mrs. Dominguez was a client, in law offices located at 250 Broadway, New York, N. Y.; the men later became partners.[2]

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[1]The two issues are wholly separate and distinct; the appellant argues that he is entitled to a new trial upon either ground. There is, however, some area of overlap; to the extent that Judge Pollack suggested that Hoffer should have testified at trial in order to preserve the question of the integrity of the evidence introduced against him, the counsel issue also pertains to the question of due diligence (Point II, infra.).

[2]The partnership agreement, executed in 1969, specifically exempted the Dominguez account from the partnership assets; Hoffer had no rights to payment from that client of the firm. (39). All References Appendix Exhibits will be noted by the numeral of the Appendix page enclosed in parentheses.

The trial evidence indicated that Hoffer had worked on some aspects of the land transactions and that he had some contact with bank transactions of the Columbia and Splindian Corporations, the intermediate purchaser of the land. Except in one regard, the evidence against Hoffer was of equivocal nature, being consistent with the position of innocence he has always maintained. (See Statement of Facts, United States v. Frank, 594 F2d 145 (2d Cir., 1974).[3]

The most significant evidence militating against Hoffer's claim of innocence involved testimony by First National City Bank, Nassau, Bahamas, branch officials Latvis and Reilly that Hoffer, Hemlock, and John Frank had access to, controlled, and withdrew more than $600,000 from, the time deposit accounts which were the penultimate destination of the land deal proceeds. The newly discovered evidence, in the form of the document introduced in Appendix 38 , was

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[3]Hoffer's claim was and is that he was an employee of Alfred Hemlock, under the latter's direction and control. Hoffer states that Hemlock explained that the land transactions were a complicated means by which Mrs. Dominguez was paying legal fees for highly unusual legal services. The international corporations were used as a conduit because the Dominican government had issued an order of expropriation for all Trujillo property, hence the high degree of secrecy.

secured after the trial; it shows beyond question that the Latvis-Reilly testimony was wholly false and inaccurate, and that Hoffer did not control, have access to, or have the power to withdraw money from, the time deposit accounts.[4]

No defense case was made at the trial; none of the defendants testified. The jury returned with a conviction in June, 1973; appeal was duly taken and the result upheld by this Court. United States v. Frank, supra., cert. denied Hoffer v. United States, 419 U.S. 828 (1974). Hoffer, sentenced to a term of imprisonment, served the time required and was paroled from custody in June, 1976. The new trial motion was filed on October 13, 1976 .

B. Post-Trial Proceedings

1. The New Documentary Evidence was Presented to the Referee

After the trial, Hoffer was required to appear

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[4]There is no evidence that the Latvis-Reilly testimony was intentionally false; the use of the term "false" in this Brief does not connote intentional distortion, but factual inaccuracy.

for discipline by the Bar in the Appellate Division, Supreme Court of the State of New York. He was entitled to a hearing on the issue of his professional responsibility; disbarment was not automatic for the crimes for which he had been convicted. Because the government had introduced false, but highly significant, testimony against him at trial, Hoffer attempted to secure documentation of his position that he did not break or have the power to break the time deposit accounts and did not withdraw hundreds of thousands of dollars from the Nassau branch of the First National City Bank. In order to acquire whatever information he could, Hoffer served the Bank with subpoena for all bank records related to the accounts in question. Consistent with its position when the government subpoenaed the same records, the Bank refused to honor the subpoena. In a compromise, it offered to voluntarily furnish to Hoffer and to the Disciplinary Hearing Referee what information it had about Hoffer's relation to the time deposit accounts. Subpoena had been served in October, 1974; the request was made, at the Bank's suggestion, one week later. It was not until approximately January 12, 1975, that the Bank finally furnished the document embodied in Appendix 38 indicating that Hoffer did not have the access to the

accounts nor did he have the power to withdraw the funds that the trial testimony indicated he had taken. (For a full description of the steps taken to secure the new evidence, See Hoffer's Supplementary Affidavit, (83-87).

Thus, almost three months passed before Hoffer was able to acquire any documentation of his position; it would not have been possible for him to do so at the trial for a variety of reasons. First, the false testimony was a surprise to Hoffer, since he did not have the access to the accounts or take $600,000; second, too much time would have been required for the document now available to have been produced at trial.[5]

2. The Referee's Findings were Presented to Judge Pollack in the Motion

After a full hearing, at which Hoffer testified and at which the new evidence was introduced, the

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[5]The Government argued in its answer to the motion that Hoffer's later acquisition of Appendix 38 constituted proof that he always "controlled" the time deposit evidence, a position advanced without a factual basis and in apparent bad faith, attempting as it does to pass the blame to Hoffer for the taint that now suffuses the Government's own evidence. (Appendix P. 75).

disciplinary hearing referee made the following findings

> There is no evidence that anything Hoffer said or did was, per se, fraudulent or unprofessional. Hoffer did not participate in the conception or the formulation of the fraudulent plan, and he made no false or deceitful statement to anyone about it; he had no financial interest in Columbia or Splindian, and he did not profit, or ever expect to profit, from the plan. . . . (Report and Opinion, Referee George Trosk [295]).

In confirming the findings made by Mr. Trosk, the Appellate Division, Supreme Court of the State of New York, First Department, made a specific determination that the time deposit evidence was

> "documentary evidence not available at the time of the criminal trial . . . which showed that Hoffer had no access to the funds of the Columbia or Splindian Corporations." In the Matter of Harry Hoffer, Reported in New York Law Journal, May 26, 1976.

3. Hoffer Testified at Disciplinary Proceedings

Unlike the trial, Hoffer took the witness stand at disciplinary proceedings to testify about the nature of his involvement with the other defendants in

the case. He told the referee that Alfred Hemlock had advised him that the proceeds of the land sales were a complicated manner for making payment for unusual legal services performed a few years earlier by Hemlock for the dictator's daughter, legal services that involved personal danger and high risk. The sale took the form of land transactions through international corporations because the Trujillo family and its descendants (to the third generation) were subject to an order of confiscation of property by the new Dominican government. These latter facts were borne out in the records and files of the case.

Hoffer also explained that he had wanted to testify at the trial but that his attorney had persuaded him not to give testimony (25-34).

4. Hoffer was Dissuaded from Testifying at Trial

It is undisputed that Mr. Hoffer wanted to testify in his own defense at the trial and that his attorney, James LaRossa, Esq., persuaded him not to testify. At the disciplinary proceedings in November, 1974, Mr. LaRossa testified that

> "I strongly recommended to Mr. Hoffer that he not take the stand in his own defense for a number of reasons.
>
> The first is that I had very serious doubts about whether his implication within the conspiracy had been proved to a legal satisfaction.
>
> In addition to that, I believed that even if the Judge did send the case to a jury, the jury would have difficulty in believing the testimony of the complainant.
>
> The third reason is that Mr. Hoffer was, in my opinion, a nervous individual, and based upon his nervousness, I did not think that he would be presented to a jury in as good a fashion as he did when he was having a conversation with two or three individuals. For those reasons, I strongly suggested that Mr. Hoffer not take the stand in his own defense. Transcript, Disciplinary Proceedings, In the Matter of Harry Hoffer, at p. 727. Appellate Division, Supreme Court of the State of New York. (A. 196 - emphasis added.)

Acknowledging that Hoffer wanted to testify, and anticipated testifying, Mr. LaRossa stated that

> "My recollection is that at one point, and I think at that point he did wish to testify as to those events. But again, unfortunately, I thought the case was going to wind up differently.
>
> I gave him my suggestions as strong as I could and I assumed he followed them based upon the fact that he thought my experience and expertise should be the deciding factor in the case. (emphasis added).

Mr. LaRossa admitted that he persuaded Hoffer not to testify, as follows (214):

> "[on] the question of persuasion, though, I believe that I was strong enough in my suggestion to him that I didn't give him much room for serious argument.
>
> I think he respected my judgment at that point, whether it be in error or not. He did tell me that he thought he should take the stand and wanted to take the stand. . . ." (emphasis added).

5. The Discovery of the Evidence Alleging Trial Counsel's Conflict of Interest

In late 1975, Hoffer commenced serving his term of imprisonment in the Allenwood Federal Prison, Allenwood, Pennsylvania.[6] Also incarcerated in that facility were co-defendants Steven Berman and John Frank. After a period of time, both men told Hoffer about the circumstances surrounding his representation at trial and, in approximately June of 1976, furnished him with the affidavits later presented with the motion for a new trial. (See Berman and Frank affidavits, (35, 36). On October 13, 1976, several

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[6]He is currently on parole.

by affiant Berman to Assistant United States Attorney MacDonald (84-86). [7]

On December 8, 1976, Judge Pollack filed the Court's opinion denying the appellant's motion in all respects, without having requested addition briefing on the issues, without notice, and without a hearing.

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[7]Berman's letters, written after Hoffer filed the motion, were informal and unsworn; his affidavit accusing Mr. LaRossa of a conflict of interest is notarized and sworn. While Judge Pollack characterized Berman's letters as "illuminating" and interpreted them as injuring Hoffer's case upon the motion, a careful reading of them reveals a substantial amount of material not only supporting his sworn statement, but amplifying the accusation. Berman only seems to backslide upon the accusation; it is clear that he was attempting to curry favor with the Government, since he will appear before the parole board in short order. The tone of the letter is that of a supplicant; it reveals a man who made a controversial accusation against a reputable and well-known attorney, and while Berman did not back off one step from the basic accusation, and - pointedly - did not recant the accusation, it is apparent that he would prefer to be let off the hook of responsibility.

Judge Pollack, in his written opinion, ignored the volatile contents of Berman's letters and the material in them that supported and amplified the sworn accusation (Point I, Argument, infra.).

months after his release from prison, Hoffer filed the motion for a new trial.

C. The Motion for a New Trial

Hoffer's motion for a new trial, supporting affidavits, and memorandum of law (15-65) were presented to the District Court on October 13, 1976, within the two year limitation imposed under Rule 33, Federal Rules of Criminal Procedure. Answering affidavit and memorandum were furnished by the Government some weeks later (66-76). Hoffer replied with two affidavits - one by counsel refuting lines of argument advanced by the Government (77-82) and one by Hoffer setting forth additional information in order to correct erroneous factual assertions made by the Government in its answer (83-87). The government countered with a supplemental affidavit to which was annexed the affidavits of three attorneys at the original trial, including one by Mr. LaRossa (89-92): these affidavits constituted a denial of the accusations made by affiants Frank and Berman. Annexed to the supplemental affidavit were two letters written

ARGUMENT

POINT ONE

THE DISTRICT COURT ERRED BY DENYING HOFFER'S MOTION FOR A NEW TRIAL UPON AFFIDAVITS AND SHOULD HAVE ORDERED AT LEAST A HEARING ON THE SIXTH AMENDMENT ISSUE.

A. Summary of the Law

"This Court takes a dim view of any summary rejection of a petition for postconviction relief when supported by a sufficient affidavit." Taylor v. United States, 487 F2d 307 (1973). It is hornbook law that where the petitioner's affidavits make out a claim which, if sustained at a hearing would merit a new trial, the reviewing Judge may not deny the relief upon opposing affidavits. Machibroda v. United States, 368 U. S. 487, 495-6 (1962); Lyle v. United States, 272 F2d 911 (5th Cir., 1955); Taylor v. United States, supra.

It is the appellant's position that both he and this Court have been "burdened with a needless appeal." Walker v. Johnston, 312 U. S. 275 (1941); Waley v. Johnston, 316 U. S. 101 (1942).

Where appropriate, postconviction relief sought purusant to 28 U.S.C. ¶2255 and pursuant to Rule 33, Federal Rules of Criminal Procedure, are to be treated alike. United States v. Franzese, 525 F2d 27 (1975). In analyzing the affidavits submitted by one who petitions for a new trial, the Court must look to "the records and files of the case." Machibroda v. United States, supra.; Dalli v. United States, 491 F2d 760 (2d Cir., 1974); Taylor v. United States, supra.[8]

It is suggested that the District Court did not make a reasonable interpretation of the "records

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[8]The Sixth Amendment issue should be regarded in context of the record, insofar as the record is consistent with the Berman-Frank accusation; the affidavits themselves raise an issue based upon material outside of the record, and on this portion, mandate at least a hearing on the question. Point II, infra., stands upon a different footing. In testing the effect of the newly discovered documentary evidence, the Court must regard the trial record as a whole, deleting that portion of the evidence that has been shown to be false. The remainder of the record must then be examined and the appropriate tests applied. United States v. Agurs, 96 S. Ct. 2392 (1976), infra. at p. 37.

and files of the case" or of the materials submitted for inspection upon the motion.[9]

B. Analysis of the District Court's Opinion

A careful reading of Judge Pollack's opinion denying appellant's motion reveals serious misinterpretations of factual allegations and the enunciation of erroneous factual conclusions. At Opinion page 3, for example, Judge Pollack summarized Hoffer's position as follows:

> "Hoffer says that he wanted to testify but his lawyer dissuaded him from taking the stand in the personal interests of the co-defendant Hemlock who was deeply involved because he paid Hoffer's legal fees." (314).

This summary is incomplete. It fails to consider the contents of the Berman and Frank affidavits

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[9]The Supreme Court has noted the risk inherent in the procedure by which the trial judge reviews new trial motions. "There is surely great economy in having the person who knows most about the case determine the validity and probable effect of alleged new evidence." United States v. Johnson, 327 U. S. 106 (1946); "but there is also the danger that the Judge might become an advocate for the result." United States v. Offutt, 348 U. S. 11 (1954); 8A Moore's Federal Practice 33.03 (1).

(35 and 36) and completely ignores the Berman letters to Mr. MacDonald (93-95). Indeed, Berman and Frank describe specific conversations that describe how the conflict occurred; they describe conferences at which Hoffer was not present in which Hemlock and they discussed "controlling" Hoffer's defense; the payment of the fee itself would not be grounds for a ruling in the appellant's favor - but Berman and Frank set out specific material upon which the accusation of conflict of interest is grounded.

In his Opinion, (315-17, 326) , Judge Pollack faulted the appellant for not raising the issue about defense counsel in earlier proceedings. Specifically, Judge Pollack noted that Hoffer had failed to accuse his trial attorney of a conflict of interest in his motion for modification of sentence (Rule 35), at his original appeal, or at disciplinary proceedings. This seeming blame placed upon the appellant is perplexing at best, since it is clear that he did not receive the affidavits from Frank and Berman until approximately June, 1976; he could not have raised earlier an issue about which he knew nothing and about which he was not possessed of legally sufficient affidavits.

In any event, the motion was filed

within the two year time limit set out in Rule 33.

Judge Pollack dismissed the affidavit of John Frank (35) as "no more than a recitation of hearsay attributed to Hemlock and Berman." (320). Even a cursory reading of Frank's affidavit reveals that insofar as that affiant actually discussed Hoffer's legal representation with Alfred Hemlock and with Berman, no hearsay was incorporated into his affidavit.[10]

Thus, John Frank's sworn statement that

> "Hemlock told me that he was going to obtain an attorney for Hoffer so that he, Hemlock, would be able to control Hoffer. . . ."

does not sound like hearsay at all, and comports with a number of subsequent events; Frank's continuing statement in the affidavit is volatile indeed:

> "Hemlock said that he had control of Hoffer through this lawyer because Hemlock was paying the lawyer . . . Hoffer wanted to take the stand in his own defense.

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[10]Even if Frank's affidavit were found to be suffused with hearsay, testimony he would offer at a hearing would be admissible evidence on a number of grounds. First, since Frank and Berman describe a conspiracy to control Hoffer's legal defense, their testimony would be admissible under the co-conspirator's exception to the hearsay rule. The Rules of Evidence, Sections 803(24) and 804(5), also provide for admission of Frank's statement' and, it is argued, so would the logic underlying the holding in Anderson v. United States, 417 U. S. 211 (1974), and its progeny.

> That Hoffer's testimony would be damaging to the other co-defendants. That Hoffer did, during this period of time, tell me he wanted to testify in his own behalf . . . that Hemlock told me that Hoffer's lawyer, at Hemlock's insistence, prevailed upon him not to take the stand in his own defense. . . ."

And trial counsel himself testified at Hoffer's disciplinary proceedings that he did indeed persuade Hoffer - who wanted to testify - not to testify. Frank's accusation comports with other events and with the affidavit and letter written by Steven Berman, who had the same kind of conversations and who was present when Hemlock made similar statements.

To hold that the Frank evidence would be inadmissible hearsay would be incorrect.

The Court also misinterpreted what affiant Steven Derman wrote to Assistant United States Attorney MacDonald in letters sent after Hoffer had filed the motion for a new trial (93-95). It is arguable that the Berman letters are not part of the "records and files" of the case, and should not have been considered by Judge Pollack. However, it is the appellant's position that Berman's letters offer substantial support for that affiant's sworn statement,

and are highly favorable to Hoffer's legal position. (See footnote 7, supra.). What is troubing is that Judge Pollack culled out material seemingly harmful to Hoffer's position and completely ignored the potent supportive material in the Berman letters.[11] (321,2).

Thus, Judge Pollack emphasized Berman's evaluation that

> "Neither of us (Frank or Berman) meant to indicate that Harry was innocent of anything and would have been acquitted had he been represented differently. . . ." (93)

as if Berman were the arbiter of the value of Hoffer's Sixth Amendment rights or the assessor of his renewed trial chances; and the Court completely ignored Berman's ensuing remarks:

> Hemlock arranged . . . to get LaRossa and to convince Hoffer that he would be in a better position if he went along with

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[11]Berman's unsworn letter states that Hoffer profited from the Dominguez transaction to the tune of $25,000 and a law partnership. This is the first suggestion from any source that Hoffer profited at all from his relationship to the party-defendants. Quite the opposite is true; Alfred Hemlock, the man who should know, testified under oath that Hoffer did not receive any reward at all for what he did; Hoffer has consistently maintained - and does so at this time in the strongest terms - that he did not profit. He absolutely denies the suggestion that there was any reward for him whatsoever.

> us . . . At the time of the trial, Hemlock was concerned that Hoffer would fold up, and then testify for you. He was able to convince LaRossa to go along with the case until such time as your case was finished. . . ." (emphasis added).
>
> While it is true that LaRossa was hired by Hemlock and paid by the three of us, he did state that if he felt that the case was going badly, he would place Hoffer on the stand to mitigate his own position. . . ." (emphasis added).

In this manner does Berman's letter detail the accusation of conflict of interest and substantiate the material contained in his earlier sworn affidavit. Several factors are apparent:

1. In light of the Berman and Frank affidavits, the payment of Hoffer's legal fees by the three co-defendants now appears to have been a deliberate effort to control Hoffer's defense posture;

2. Berman did not take advantage of the opportunity to recant the affidavit in his letter to Mr. MacDonald, but went further with the accusation and fleshed out a greater number of details of the accusation;

3. Taken in conjunction with Frank's affidavit, Berman's statements, both sworn and unsworn, create an unavoidable question of fact for the Court.

In view of the undisputed fact that his trial attorney dissuaded Hoffer from testifying at the trial, the troubling accusation made by Frank and Berman

reached a disturbing fruition in actual events.

In making fact findings upon the motion papers and affidavits filed by both the appellant and the government, Judge Pollack committed error. The clear teaching of the case law in this Circuit and in the Supreme Court is that where the affidavits submitted in support of the motion make out a case which - if supported - would entitled the petitioner relief, then the Court must grant at least a hearing in order to determine the issue. Machibroda v. United States, supra., Taylor v. United States, supra., Hayman v. United States, 342 U. S. 205 (1952).

The Hayman case is particularly relevant. In that action, the petitioner accused trial counsel of a conflict of interest. The Court held hearings without the petitioner being present, made findings, and denied relief. The Supreme Court, in reversing the decision, held that a full due process hearing was required when a question of fact was raised in the affidavits. It is beyond doubt that Hoffer's motion papers and the Frank and Berman affidavits make out a question of fact and - on their face - a conflict of interest.

C. The Question of Waiver

In addition to dismissing Hoffer's claims, the District Court opinion also implied that the appellant may have waived his right to make any claim at this time regarding true counsel. Thus, Judge Pollack cited two decisions of this Court, which stand for the proposition that a waiver of an objection to a conflict of interest may occur under some circumstances, as authority for the proposition that Hoffer waived his current objection. (332). This conclusion is based upon an erroneous interpretation of the holdings of this Court in United States v. Wisniewski, 478 F2d 274 (2d Cir., 1973), and United States v. Armedo-Sarmento, 524 F2d 591 (2d Cir., 1975). Those cases are quite distinct from the case at bar.

Neither stand for the proposition that mere acceptance of assistance in payment of counsel fees constitutes a knowing, conscious, deliberate waiver of one's Sixth Amendment right to a counsel unencumbered by other loyalties. Both stand for the proposition that unsupported, generalized allegations of conflict are insufficient to reverse a conviction. And in one of those cases, where the conflict alleged was based

merely upon a prior relationship between counsel and another defendant, the Court held that such a relationship, by itself, was insufficient to impute a conflict of interest to the attorney, especially where the trial record incorporated an actual waiver. Similarly in United States v. McCord, 509 F2d 334 D. C. Cir., 1974), mere consultation with officials in the White House regarding the progress of the Watergate investigation, absent some specific showing, was held to be insufficient to impute a conflict of interest to the defense attorney. Hoffer, by contrast, shows specific - not generalized - material relating to the conflict; the affidavits submitted spell out meetings, conferences, and discussions, which reflect the nature of the conflict. Nor, in accepting assistance in the payment of counsel fees can Hoffer be said to have waived objection to unfaithful counsel; such a requirement is palpably unjust and could lead to unjust results in more cases than this one.

D. The Appropriate Relief

Thus, at a bare minimum, Hoffer is entitled to a hearing on the issue of whether or not defense counsel

acted under a conflict of interest. This Court is urged, however, to reverse the findings of the District Court and to grant appellant a new trial without holding hearings, as is within its powers. Mesarosh v. United States, 352 U. S. 1 (1956); Remmer v. United States, 347 U. S. 227 (1954).

While the appellant would normally bear the burden of proving the question of fact upon a hearing, there is authority for shifting the burden to the Government and requiring them to prove that Hoffer had the effective assistance of counsel at the original trial. DeCoster v. United States, 487 F2d 1197 (D. C. Cir. 1973; - F2d - October 19, 1976; Criminal Law Reporter, October 26, 1976. According to that decision, rendered by the District of Columbia Circuit on October 19, 1976, the burden of proving the effective assistance of counsel shifts to the Government in some circumstances. Hoffer's case meets those circumstantial requirements. It is respectfully urged that the Government, in its answer to the motion, has met no burden at all.[12]

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[12]At the very least, good faith would seem to have required the government to acknowledge at least two facts - first, that its conviction was based upon tainted testimony and that the Latvis-Reilly testimony was highly significant in the trial context; and second, that the law of this Circuit mandates a hearing on

If this Court declines to apply DeCoster and to order a new trial, then the matter should be remanded to the District Court for a hearing. The Taylor decision provides for the assignment of another judge to conduct the proceedings.

Point I, based upon the affidavits Hoffer submitted with his motion. If, under Taylor, an affidavit filed by the prosecuting Assistant United States Attorney was insufficient to override a petitioner's right to a hearing, then neither is that of an attorney unexalted by public office. Rather than address the issues and fairly state the questions, the government's answer to the motion reflected a complete avoidance of the issues raised by Hoffer.

POINT TWO

THE DISTRICT COURT ERRED IN DENYING APPELLANT'S MOTION FOR A NEW TRIAL BASED UPON NEWLY DISCOVERED DOCUMENTARY EVIDENCE OF THE TIME DEPOSIT ACCOUNTS.

A. The Legal Standard

A motion for a new trial will lie where the proof meets four standards:

1. the evidence in question has been discovered since the trial;

2. the evidence is material, not cumulative;

3. the introduction of this evidence would probably have caused a different result;

4. the evidence could not have been discovered with due diligence before the trial. United States v. Slutsky, 514 F2d 1222 (2d Cir., 1975); United States v. Dellacroce, 491 F2d 268 (2d Cir., 1974, cert. denied 419 U. S. 825 (1974); United States v. Kahn, 417 F2d 272 (2d Cir., 1973), cert. denied 411 U. S. 982 (1973);

United States v. Marquez, 363 F. Supp. 802, affirmed without opinion 489 F2d 753 and 490 F2d 1383 (2d Cir., 1974), cert. denied 419 U. S. 826 (1974).

Judge Pollack dismissed the appellant's claims by stating that Hoffer's material had failed "each of the foregoing tests." This was error. (330).

1. The Evidence was Discovered After the Trial

There is no doubt that Hoffer discovered the documentary proof about the time deposit accounts after the trial. He sought it only because erroneous, false testimony had been introduced at the trial - the Latvis-Reilly testimony that Hoffer, along with Hemlock and Frank, controlled, broke, and withdrew $600,000 from, the bank time deposit accounts in the Nassau bank. He needed the evidence from the bank in order to counter this false testimony; he needed it to demonstrate to the Referee at Disciplinary Hearings that he did not "cart away the loot" of hundreds of thousands of dollars.

Hoffer's supplementary affidavit reveals how he went about securing the evidence regarding the time

deposit accounts (283-7). After refusing to honor Hoffer's subpoena, as it had refused to honor the government's subpoena at an earlier time, the Bank voluntarily furnished what information it had about the appellant's relation to the time deposit accounts. Thus, after waiting from late October until January 12 (approximately), Hoffer was able to secure the document embodied in Appendix 38, putting the lie to Latvis and Reilly.

The Appellate Division, First Department, Supreme Court of the State of New York, made a specific finding that the time deposit evidence was "documentary evidence not available at the time of the criminal trial . . . which showed that Hoffer had no access to the funds of the Columbia or Splindian Corporations." In the Matter of Harry Hoffer, New York Law Journal, May 26, 1976.

It is clear that the document was newly discovered in light of this litigant's inability to forecast the introduction of false testimony, in light of the stay upon the bank documents issued by the Bahamian Appellate Court during the pendency of the original trial, and in view of the fact that the

introduction of the Latvis-Reilly false testimony came at the end of a short (ten-day) trial.

2. The Exercise of Due Diligence Could Not Have Procured the Document Earlier

This point should be answered with a question. How does a litigant forecast the introduction of false testimony of such importance? And how does one procure documents that to this day are unavailable to him (the full range of bank documents) and were not available even to the United States Government? It should not be disregarded that a Bahamian Appellate Court had issued a stay upon the release of the bank documents and that all the documents were simply unavailable at the trial.[13] Had the Government not introduced erroneous and highly damaging testimony at the trial, Hoffer would have had

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[13]The full range of bank documents are not available to Hoffer even today (283-7). He attempted to subpoena the documents and failed, at a time when Alfred Hemlock's stay no longer held. For the Government to state in its answer that Hoffer's later acquisition of Appendix 38 is proof that he "controlled" the bank documents all the time is a bad faith argument, made without a factual basis and with the desire to pass the responsibility back to Hoffer. (75).

no necessity to try to buttress his position with documentary proof - documentary proof that contradicts the false testimony.

To hold Hoffer, or any litigant, to the requirement of finding such documents before the trial is simply unreasonable,[14] and could easily lead to unjust results. A defendant should not be required to possess the qualities of Cassandra, forecasting the bad news of false testimony and reading the terrible future of being penalized for failing to foresee the manner in which untrue versions of facts would be introduced at trial.

The Slutsky case is authoritative by its contrast to this one. In Slutsky, the documents in question were always in the possession of that appellant; they belonged to another of his business enterprises and presumably, always existed. The second distinction is that where Slutsky wished to employ the "newly discovered" documents to make a potential defense argument to the jury, Hoffer's newly discovered evidence demonstrates beyond the peradventure of a doubt that

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[14]The Due Diligence standard, after all, is one of reasonableness.

the most damaging evidence at the trial was simply false. Thus, Hoffer does not claim that at last he has figured out a defense; he has demonstrated that he was convicted upon false testimony, has found documentation for his position, and that if the trial evidence had been faithful to all the facts, he would not have been convicted.

Nor would the due diligence standard or any other aspect of the Slutsky test have required Hoffer to testify in order to preserve his objection to the false testimony; nor can a defendant's testimony be required as an aspect of due diligence. Such a holding would collide with Fifth Amendment considerations and could lead to injustice in many circumstances where for any number of reasons - good or evil - a defendant did not testify in his own defense. In raising the issue, Judge Pollack laid the responsibility for the false testimony back at Hoffer's doorstep; this position does not seem to be the law in any jurisdiction, and counsel is unaware of any holding that would require a defendant to testify in order to preserve objection to false evidence.[15]

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[15]While this Court in the original appeal noted the additional consequences of a defendant's failure to

Moreover, testimony by this or any other defendant would not constitute complete insulation against the pernicious effects of untruthful testimony. Any defendant would be regarded as an interested witness as a matter of law, and the jury would be so charged; furthermore, his status as defendant would naturally diminish the value of his testimony - even before the government attacked his credibility in closing argument.

3. The Evidence is Material, Not Cumulative

The Latvis-Reilly testimony was of crucial importance at the trial. It furnished the jury the sole testimony from which it could conclude that Hoffer profited from criminal activity. Without this evidence, the jury could not have convicted Hoffer since there would have been no evidence whatsoever that Hoffer's actions were other than innocent. There would have

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testify at trial, the suggestion that an individual need testify in order to preserve the objection to false or inaccurate testimony would have a pernicious effect on the respect for truth the legal process hopes to embody, especially in cases where a defendant is persuaded not to testify by his attorney. Such a holding would certainly not comport with the "interest of justice" incorporated in Rule 33.

been, without the Latvis-Reilly testimony, no evidence whatsoever of guilty knowledge, guilty action, or motive.

The government fashioned a highly graphic argument based upon the Latvis-Reilly testimony. A glance at its Brief on Appeal (United States v. Frank, supra.) reveals the importance the government placed upon the testimony in question:

> The purchase monies were largely funneled back to Hemlock, Hoffer, and Frank, who carried away some $600,000 in cash from a Bahamian bank account . . . Brief on Appeal, at p. 3;
>
> Hemlock, Hoffer, and Frank break the time deposits and leave the Nassau Branch with a large sum of cash. Id., at p. 16;
>
> Hoffer's signature was necessary to deposit and withdraw the funds from the two Bahamian time deposit accounts and he participated in carting off the loot. Id., at p. 25 (emphasis added).

Based upon that argument, this Court sustained Hoffer's conviction with the following statement:

> Perhaps the most damaging evidence against them (Hoffer and Hemlock) was their personal participation with Frank in the breaking of the time deposit just after Frank learned that the jig might be beginning to be up. . . . United States v. Frank, id., at p. 153.

Thus, a careful analysis of all the records and files of the case reveals the central importance of the Latvis-Reilly testimony in Hoffer's conviction and in the affirmance of that conviction upon appeal.[16]

4. The Jury Would Have Reached A Different Result

The time deposit evidence was so damaging to Hoffer's trial chances that without its introduction into evidence he would have been acquitted. A reading of all the records and files of the case reveals the importance all the parties placed in the Latvis-Reilly

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[16]The government tried in vain to secure all the bank records for the trial. (Pre-Trial Hearing Transcript, pp. 1-104, on the issue of the bank records). Alfred Hemlock initiated proceedings in the Bahamas in order to block acquisition of the full range of documents by the government and secured a stay of release of those documents pursuant to Bahamian Bank Secrecy Laws. Hoffer was a bystander to all proceedings regarding the documents.

The government's position was that the documents were necessary, inter alia, to protect against factual misstatement by a testifying defendant. (Pre-Trial Hearing transcript, p. 22). Now, when the factual misstatement has been shown to have occurred in the Government's own case, the vigilant pursuit of the truth initially undertaken by the Government has relaxed and shows more tolerance of untruthful trial evidence and of its effects.

testimony. As noted before, the government's graphic use of language and its repetitive reference to the $600,000 that Hoffer carted away as "loot" is indicative of the critical nature of this testimony and the extent to which the Government relied upon its presence in the record.

A further index of the importance of the Latvis-Reilly material is implicit in the conclusions of the disciplinary hearing referee, the Hon. George Trosk, who concluded as follows (Appendix Exhibit L):

> There is no evidence that anything Hoffer said or did was, per se, fraudulent or unprofessional. Hoffer did not participate in the conception or the formulation of the fraudulent plan, and he made no false or decietful statement to anyone about it; he had no financial interest in Columbia or Splindian, and he did not profit, or ever expect to profit, from the plan. Report and Opinion, Referee George Trosk.[17] (emphasis added). (304)

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[17]The Referee was not spared from criticism by the District Court, which stated that the Referee "did not advert to the obligation of attorney Hoffer to the client he was serving so prolifically and whether Hoffer was entitled to blindfold himself to the obvious." (327). This assessment is directly contradicted by the first sentence of the Referee's finding as quoted above. The Referee concluded that Hoffer had "held Hemlock in such respect and awe during the period here involved that suspicion of him never entered Hoffer's mind. . . ." And lest the

Thus, with all the testimony before the Referee, including Hoffer's own testimony, it was found that "Respondent Hoffer has overcome the presumption of guilt created by his conviction in the Federal Court. . . .": Referee's Report and Opinion, id. With findings like this one, and upon an analysis of the records and files of the case, there is no doubt that Hoffer would likely have been acquitted at the trial were the truth alone in evidence, and there is no doubt that he would be acquitted now were a new trial held.

B. Appellant Has Met His Burden

Under any standard, this appellant has met all the requirements. Where such a material portion of the trial evidence was false, it is respectfully suggested that this Court apply the test accorded to perjured testimony - that upon a new trial a jury might reach a different result. Larrison v. United States, 247 F2d 82 (7th Cir., 1928), as applied in

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Referee be accused of a pollyannish view, it should be noted that his findings were not so generous to Alfred Hemlock, who was unfavorably characterized and disbarred.

United States v. Hiss, 107 F. Supp. 128 (S.D.N.Y., 1952), affirmed 201 F2d 372 (2d Cir., 1953), cert. denied 345 U. S. 942 (1953). See also 8A Moore's Federal Practice Section 33.06(1). In Mesarosh v. United States, 352 U. S. 1 (1956), the Supreme Court held that it was an abuse of discretion to deny a motion for a new trial based upon a perjury committed by the government's chief witness; the perjury had occurred in another matter in which the same witness testified but the Court held that fact sufficient to merit a new trial. While no perjury is in question here, the misstatement of fact was so damaging at the trial and its effect so harmful to Hoffer, that the Mesarosh standard should pertain.

Under the Slutsky standard, the appellant has shown the high probability - if not the likelihood - of a different trial result, especially in view of the Referee's exoneration of the appellant. And in its answer to Hoffer's motion, the Government argued that the standard enunciated recently in United States v. Agurs, 96 S. Ct. 2392, - U. S. - (1976), should be applied. Even under this standard, the appellant merits a new trial:

> "The proper standard of materiality must reflect our

> overriding concern with the justice of the finding of guilt. Such a finding is permissible only if supported by evidence establishing guilt beyond a reasonable doubt. It necessarily follows that if the omitted evidence creats a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission must be evaluated in the context of the entire record." (emphasis supplied).

Under any standard, then, the appellant is entitled to receive a new trial, under either Point I or Point II of this argument.

CONCLUSION

It has been shown that the most damaging trial evidence against the appellant was false and inaccurate, and that Hoffer did not withdraw hundreds of thousands of dollars from limited access time deposit accounts in the First National City Bank, Nassau Bahamas. It has also been shown that Hoffer meets all the tests required of newly discovered evidence. Therefore, upon the documentary proof, it is clear that the District Court erred in denying relief on Point II of this Brief and that Hoffer is entitled to a new trial on the issue.

It has also been shown that Hoffer has submitted ample proof by way of affidavits to raise the question of trial counsel's conflict of interest. The law is clear that upon such affidavits, a petitioner is entitled to a full, due process hearing to resolve questions of fact. Thus, in denying Hoffer's motion without a hearing, the District Court committed error.

It has also been shown that the Government's answer to Hoffer's motion avoided the arguments raised, failed to deal directly with the issues, and failed to meet any burden. Upon the ground raised in Point I, then, it is clear that Hoffer is entitled, at a minimum, to a hearing and that, under the holding in DeCoster v. United States, supra., is entitled to a new trial.

WHEREFORE, it is respectfully requested that this Court reverse the determination of the District Court and order a new trial. Short of that, a hearing is required with the provision that a new District Court judge be designated to preside.

Respectfully Submitted,

RALPH S. NADEN
Attorney for Appellant
HARRY HOFFER
253 Broadway, Rm. 850
New York, N.Y. 10007
(212) 964-1998

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 21 day of Jan. ,19 77 at No. 1. St. Andrews Pl. NYC

deponent servied the within Brief

upon U.S. Atty. So. Dist. of NY

the Plaintiff-Appellee herein, by delivering 3 true copy(ies) thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Plaintiff-Appellee therein.

Sworn to before me this
21 day of Jan. 1977.

Edward Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978